IN THE
Supreme Court of the United States
OCTOBER TERM, 1974

No. 74-1106

UNITED STATES OF AMERICA,
Petitioner,

v.

GREGORY V. WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to
The District of Columbia Court of Appeals

MEMORANDUM IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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INTRODUCTION

In light of the fact that this Court has already granted a writ of certiorari in *United States v. Mandujano*, 496 F.2d 1050 (Sup. Ct. No. 74-754, writ of certiorari granted March 24, 1975), the respondent herein does not oppose the government's petition for a writ of certiorari in this case. In *Mandujano*, the government has asked this Court to rule that no witness before a grand jury, even a potential defendant who is in

fact the target of the grand jury's inquiry, is entitled to be advised prior to testifying of his Fifth Amendment privilege against self-incrimination. As the government's petition in *Mandujano* sets forth the facts, however, that case does not squarely present the broad question the government seeks to have this Court answer. The instant case does. Unlike Mandujano, the respondent here was the target of the grand jury before which he testified; Mandujano, according to the government's petition, was a witness before a grand jury investigating other suspects. Unlike Mandujano, the respondent here was indicted for the substantive offense about which he testified; Mandujano was indicted for perjury because he lied to the grand jury.[1] Since this Court is being asked to make a broad ruling cutting across distinct fact situations, respondent submits that the Court should have before it a case, such as the instant one, which presents the issue raised by the government in its purest form.[2]

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[1] Mandujano was also indicted for an attempt to sell heroin. After the district court suppressed Mandujano's grand jury testimony, the government proceeded to trial on the heroin charge without the use of that testimony. Mandujano was convicted and his conviction was affirmed by the Court of Appeals, 499 F.2d 370 (C.A. 5, 1974), a separate decision from that to be reviewed in No. 74-754. Mandujano's petition for a writ of certiorari to review that decision (Sup. Ct. No. 74-5441) was denied on January 13, 1975.

[2] On or before May 21, 1975, respondent will file a cross-petition for a writ of certiorari to review another part of the decision of the Court of Appeals in this case. See note 5, *infra*.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

1. Whether a person subpoenaed to testify before the grand jury who is in fact the target of the grand jury inquiry is entitled to be advised of his Fifth Amendment privilege against self-incrimination, including the warning that he is the target of the grand jury and might be indicted.

COUNTERSTATEMENT OF THE CASE

Respondent's van, occupied at the time by two of respondent's friends, was seized and impounded by the police after they discovered a stolen motorcycle in its rear compartment. As the petition correctly points out, respondent's initial efforts to recover his van were unsuccessful because the police officer connected with the investigation did not believe respondent's explanation for the presence of the motorcycle and refused to release the van. Respondent next sought the release of his van from Assistant United States Attorney Stuckey, then assigned to the grand jury section of the United States Attorney's Office. As the petition states accurately, Stuckey too did not believe respondent's explanation. Because he doubted the truthfulness of respondent's story, Stuckey subpoenaed respondent to appear before the grand jury (Tr. 42).[3] At this point, however, the petition passes over certain critical facts of record.

In giving the subpoena to respondent, prosecutor Stuckey did not tell respondent that the grand jury was focusing on *him*, much less that he might be indicted as a result

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[3] "Tr." refers to the one-volume transcript of the suppression hearing held on June 29, 1973.

of his own testimony. Stuckey did not even tell respondent that he might be wise to consult an attorney. Instead, Stuckey told respondent only that he was needed by the grand jury "as a witness" (Tr. 38).

Respondent appeared before the grand jury pursuant to the subpoena. Assistant United States Attorney Shine was in charge of the grand jury that day. Shine had read the notes of Stuckey's interview with respondent and shared Stuckey's doubts as to the veracity of respondent's story. He determined to put respondent before the grand jury to let that body pass on the credibility of respondent's story, realizing the likelihood that respondent would be indicted (Tr. 56).

Respondent was brought into the grand jury room and the oath was administered; then, for the first time, in front of the assembled grand jurors, Shine advised respondent of his right to remain silent and his right to an attorney. These were the only warnings given to respondent at any time prior to his grand jury testimony. Significantly, the warnings were given without any indication to respondent as to why he might choose to remain silent or to request an attorney: he was never advised, at any time, that *he* was a potential defendant who could and probably would be indicted, by that grand jury, solely on the basis of his own testimony. From all that appears in the record, respondent testified on the obviously mistaken assumption that he was a witness in a case involving two other persons.

Respondent was indicted for grand larceny and receiving stolen property; the sole basis for the indictment was his testimony before the grand jury.

After a hearing on respondent's motions to suppress and to dismiss the indictment, the Honorable Joseph M.

Hannon, presiding in the Superior Court for the District of Columbia, found as a fact that at the time he appeared before the grand jury, respondent was the target of the grand jury whom the prosecutor had reason to think would be indicted. The trial court held that respondent did not voluntarily, knowingly and intelligently waive his Fifth Amendment privilege, in part because he was forced to assert the privilege or waive it in front of the grand jury itself and in part because the warnings did not inform him that he was a potential defendant who was likely to be indicted by that very grand jury. Accordingly, the trial court suppressed respondent's grand jury testimony. After reviewing the entire grand jury transcript, the trial court also found as a fact that the indictment against respondent was based *solely* on respondent's illegally obtained grand jury testimony. Finding no other evidence to support the indictment, the trial court granted the motion to dismiss.[4]

The United States appealed. A panel of the District of Columbia Court of Appeals, in an opinion written by Judge Nebeker, affirmed the trial court's suppression of respondent's grand jury testimony, holding that respondent had not voluntarily, knowingly and intelligently waived his Fifth Amendment privilege because he was not told, and presumably did not know. that he was the target of the

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[4] The trial court's written opinion and order dismissing the indictment, dated July 5, 1973, is not appended to the government's petition. It is attached as an appendix to respondent's cross-petition. See note 5, *infra*.

grand jury's inquiry and because the setting inside the grand jury room was not conducive to a truly voluntary waiver.[5]

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[5] A majority of the panel, with Judge Kern vigorously dissenting, reversed the trial court's dismissal of the indictment, holding that *any* facially valid indictment is enough to call for a trial of the charge on the merits. On December 20, 1974, respondent filed a Petition For Rehearing *En Banc* with respect to that part of the decision by the majority of the panel which reversed the trial court's dismissal of respondent's indictment. On February 20, 1975, the District of Columbia Court of Appeals denied respondent's Petition For Rehearing *En Banc*, with three judges, not including Judge Kern, voting to grant the Petition.

Respondent intends to file a cross-petition for a writ of certiorari to review that part of the court's decision which reversed the trial court's dismissal of respondent's indictment. Respondent recognizes, as did the dissenting judge below, that under prior decisions of this Court, indictments based in part on incompetent evidence or evidence obtained illegally outside the grand jury are nevertheless valid. Respondent agrees with the dissenting judge, however, that indictments based *solely* on evidence extracted by the grand jury *itself* in violation of the defendant's Fifth Amendment rights cannot be sustained. Respondent's petition is presently due to be filed in this Court on May 21, 1975, time for filing having been tolled by the filing of the Petition For Rehearing *En Banc*. *Department of Banking v. Pink*, 377 U.S. 264, 266 (1942).

ARGUMENT

From the foregoing statement of the case, it should be clear that this case is not *Mandujano*. In *Mandujano*, the government has asked this Court to decide the important question of whether a grand jury target witness is entitled to be advised of his rights in a case in which, according to the government's own characterization of the facts, the witness was not even the target of the grand jury, and in which the witness was not indicted for the substantive offense about which he testified, but was indicted for perjury because he lied to the grand jury.[6] If it is true, as the government asserts in its petition in *Mandujano*, that at the time of Mandujano's grand jury testimony, the government had no interest in Mandujano himself and was interested only in others about whom Mandujano was thought to have information,[7] then perhaps he was more like an ordinary grand jury witness and, as such, was entitled to no special warnings of his rights. Even if Mandujano was entitled to certain warnings which he did not receive, he was clearly warned about perjury, and the government may be correct when it contends that he had no license to lie to the grand jury and then have his testimony suppressed in a resulting prosecution for perjury. Whatever the answers to these questions may be, however, they do not control Mr. Washington's case.

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[6] See note 1, *supra*.

[7] The government goes so far as to speculate that if Mandujano had cooperated and given truthful testimony, he would not have been indicted for the substantive drug offense and, of course, could not have been indicted for perjury either. Petition in *Mandujano* at 17, note 9.

Gregory Washington was, by any definition and in the truest sense of the term, a "putative defendant." A police officer and two prosecutors had discredited his story about the motorcycle found in his van, and he was subpoenaed to the grand jury for the *sole* purpose of obtaining an indictment against him if the grand jury also did not believe his testimony. Apparently the grand jury did not believe Mr. Washington's testimony, and he was indicted. He was indicted not for perjury, but for the substantive crime about which he testified. Moreover, he was indicted solely on his own testimony; if he had not testified he could not have been indicted.

This case, then, presents in pure form the question which the government seeks to have this Court decide in *Mandujano*. Respondent respectfully submits that this Court should have before it a case in which the witness was in fact the target of the grand jury if it intends to rule broadly, as the government has requested, on the rights of target witnesses or "putative defendants."

CONCLUSION

For the foregoing reasons, respondent does not oppose the government's petition for a writ of certiorari.

Respectfully submitted,

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May, 1975.